Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Pioneer's	)	
Preference Rules	)	ET Docket No. 93-266
	)	
and	)	
	)	
In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New Personal	)	PP-6, PP-52, and PP-58
Communications Services	)	

Memorandum Opinion and Order on Remand

Adopted: August 9, 1994 ; Released: August 9, 1994

By the Commission: Chairman Hundt not participating; Commissioner Chong not participating.

I. INTRODUCTION AND SUMMARY

1. In this order, we amend our pioneer's preference rules to require that recipients of pioneer's preferences in proceedings where tentative decisions on preference requests had been made at the time Congress enacted auction legislation must pay for their licenses. This decision applies to three proceedings -- 2 GHz personal communications services (Broadband PCS), local multipoint distribution service (LMDS) and low earth orbital satellite services in the 1.6/2.4 GHz band (so-called Big LEOs).[1] Because we have reached a decision awarding final preferences in only one of these proceedings -- broadband PCS -- that is the only proceeding for which we will determine now the appropriate amount of payment to be made. Broadband PCS pioneer's preference winners will have a choice of paying either (i) ninety percent (90%) of the winning bid for the 30 MHz license in the same market; or (ii) ninety percent (90%) of the adjusted value of the license calculated based upon the average per

[1] While we name the three current recipients of broadband PCS preferences for ease of reference, we emphasize that by doing so in no way do we intend to indicate prejudgment of the petitions for reconsideration of our broadband PCS pioneer's preference decision. The payment rule we adopt here will apply to the three proceedings in which a tentative (but not final) decision regarding preferences had been made as of August 10, 1993 in the three proceedings.

population price for the 30 MHz licenses in the top 10 markets as established at auction.

II. BACKGROUND

2. The pioneer's preference rules provide a means by which an applicant that demonstrates that it has developed a new communications service or technology may obtain a license to provide the new service or technology without being subject to mutually exclusive applications.[2] Under the pioneer's preference rules, an applicant may be granted a preference for a license if it demonstrates that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state. The applicant for a preference must also demonstrate that the new service or technology is technically feasible by submitting either the results of an experiment or a technical showing. The preference will be granted only if the final service rules adopted by the Commission are a reasonable outgrowth of the applicant's proposal and the new technology can be used to provide the service. An applicant who meets these standards and is granted a pioneer's preference is not subject to competing applications, and if otherwise qualified will receive a license.

3. In October 1992, the Commission tentatively granted pioneer's preferences to American Personal Communications (APC) for its development and demonstration of technologies that facilitate spectrum sharing by PCS and microwave users at 2 GHz, to Cox Enterprises, Inc. (Cox) for its development and demonstration of PCS/cable plant interface technology and equipment that result in a spectrum-efficient application of PCS services, and to Omnipoint Communications, Inc. (Omnipoint) for its development of 2 GHz equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies.[3] In December 1993, the Commission granted final pioneer's preferences to APC, Cox, and Omnipoint.[4] The Commission determined that, if otherwise qualified, APC would be licensed to use Channel Block A in the Major Trading Area (MTA) that includes Washington, D.C. and Baltimore, Maryland (Washington-Baltimore MTA); Cox would be licensed to use Channel Block A in the MTA that includes San Diego, California (Los Angeles-San Diego MTA); and Omnipoint would be

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[2] The pioneer's preference rules are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1993).

[3] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7797-7804 (1992).

[4] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Third Report and Order, 9 FCC Rcd 1337, paras. 10-36 (APC), paras. 37-50 (Cox); and paras. 51-74 (Omnipoint) (1994) ("*Broadband Report and Order*"), recon. pending; petitions for review filed, Pacific Bell v. FCC, D.C. Circuit Nos. 94-1148 *et al.*, remanded on the Commission's own motion, July 26, 1994.

licensed to use Channel Block A in the MTA that includes northern New Jersey (New York MTA (including northern New Jersey)).[5] In granting these pioneer's preferences, the Commission directed the licensing bureau to condition any 2 GHz PCS license obtained through the pioneer's preference process upon the licensee's building a system that substantially uses the design and technologies upon which the preference award was based;[6] and upon the licensee's holding the license for a minimum of three years or until the construction requirements applicable to the five-year build-out period have been satisfied, whichever occurs first.[7] In December 1992, the Commission also awarded a tentative preference to Suite 12 Group in the LMDS service.[8] In August 1992, the Commission tentatively denied all requests for preferences in the Big LEO service.[9]

4. After these tentative decisions, Congress gave the Commission authority to award licenses by auction.[10] The Commission then issued a Notice of Proposed Rule Making in ET Docket No. 93-266 to evaluate whether it should change the pioneer's preference rules in light of this landmark change in its statutory authority. The Commission was concerned that the competitive bidding authority may have undermined the basis for the pioneer's preference rules:

Establishment of competitive bidding authority creates a new dynamic for the

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[5] *Broadband Report and Order*, 9 FCC Rcd at 1349, para. 80.

[6] This condition applies only in the service area for which the preference is granted and only for the initial required five-year build-out period specified in the broadband PCS rules. *Broadband Report and Order*, 9 FCC Rcd at 1339, para. 8.

[7] Id. at para. 9. This is consistent with the conditions that the Commission directed the licensing bureau to place upon the license granted to the narrowband PCS (900 Mhz) pioneer's preference recipient. *See* Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Memorandum Opinion and Order, 9 FCC Rcd 1309, 1316, paras. 47-48 (1994) (*Narrowband Reconsideration*), recon. pending (unrelated to pioneer's preference).

[8] Establishment of Local Multipoint Distribution Service, CC Docket No. 92-297, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993).

[9] Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, ET Docket No. 92-28, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 6414 (1992).

[10] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, § 6002, 107 Stat. 387 (enacted Aug. 10, 1993).

> assignment of licenses. Specifically, a bidder, who may also happen to be an innovator, through its bidding efforts would primarily control whether it obtains the desired license. It may obtain the license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists. One may conclude, therefore, that under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s). Thus, we are concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules.[11]

The Commission asked for comment on how any changes in the pioneer's preference rules as a result of auction authority should apply to the three proceedings in which tentative preference decisions had been issued.

5. Several commenters argued that, at the very least, preference recipients in these proceedings should be required to pay for their licenses. Specifically, for example, Pacific Bell and Nevada Bell argued that an "outright grant of a license would confer a significant cost advantage in a highly competitive market over firms which will be required to expend financial resources to successfully bid in auctions to acquire spectrum."[12] Nextel argued that, to prevent anticompetitive inequities in the cost of obtaining Commission licenses, the preference winners should have to pay for their licenses.[13] PageMart, Inc. argued that the pioneer's preferences were designed to provide "regulatory certainty for an innovator; they were not intended to result in a financial windfall."[14] PageMart further argued that non-pioneer licensees would be handicapped (without any public benefit) if they had to take on a substantial financial burden that was not imposed on preference grantees.[15] Southwestern Bell argued that "allowing the pioneers to be licensed without making a similar investment [as those who bid] not only would subvert the intentions of Congress in setting up the auction process, it would also grossly distort the competitive dynamics of the new market the

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[11] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Notice of Proposed Rulemaking, 8 FCC Rcd 7692, 7693, para. 7 (1993) ("*Pioneer's Preference Review NPRM*").

[12] Comments of Pacific Bell and Nevada Bell at 2 (filed Nov. 15, 1993).

[13] Comments of Nextel Communications, Inc. at 9 (filed Nov. 15, 1993).

[14] Comments of PageMart, Inc. at 6 (filed Nov. 15, 1993).

[15] Id.

Commission is creating."[16] NYNEX argued that requiring all licenses (including pioneer's licenses) to be competitively awarded would promote economic efficiency by allowing the competitive market to determine the value of the pioneer's innovation.[17] Other commenters including APC, Cox, and Omnipoint argued that any such charge would be inequitable.[18] In the *Pioneer's Preference Review Report and Order*, while not reaching the overall question of what changes, if any, should be made in its preference rules, the Commission decided that it would be "inequitable" to apply any such rule changes to the three proceedings at issue here.[19] Its explanation, in full, for this decision was as follows:

> We conclude that it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued. Notwithstanding that other licensees in the three proceedings at issue may have to pay for their licenses, preference applicants in these proceedings have submitted their requests and publicly disclosed substantial detail of their system designs in reliance on the continued applicability of the pioneer's preference rules. We have evaluated their requests based on existing rules and issued Tentative Decisions, and parties have expended not inconsiderable resources to further argue the merits or demerits of the requests and our tentative conclusions addressing the requests. Had the rules been different, these applicants might have structured their requests differently; or conducted research, development, and experimentation differently; or elected not to disclose detailed information about their systems. We conclude that notwithstanding our legal authority to treat 2 GHz broadband PCS pending applicants differently than the 900 MHz narrowband PCS pioneer (Mtel) and

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[16] Initial Comments of Southwestern Bell Corporation at Appendix A, p.2 (filed Nov. 15, 1993).

[17] Comments of the NYNEX Corporation at 3 (filed Nov. 15, 1993). NYNEX also suggested that the winning pioneer should receive a discount or some other special financial arrangement. Id.

[18] *See, e.g.,* Comments of Cox Enterprises, Inc. at 12-13 (filed Nov. 15, 1993); Comments of Omnipoint Communications, Inc. at 24-28 (filed Nov. 15, 1993). *See also* Comments of Suite 12 Group at 15-16 (filed Nov. 15, 1993) ("...if the Commission decides to eliminate or alter significantly the pioneer's preference rules in this proceeding, equity demands that the tentative grants made in several proceedings, including the grant to Suite 12 in the LMDS proceeding, be grandfathered from any such changes in the rules."); Comments of CELSAT, Inc. at 5 (filed Nov. 15, 1993) ("...any modifications of the Commission's rules now to eliminate or limit the benefits of a pioneer's preference for otherwise deserving applicants would be manifestly unfair.")

[19] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd 605, 610-11 (1994) ("*Pioneer's Preference Review Report and Order*").

> also to apply changed rules prospectively to pending applicants in the 28 GHz LMDS and 1.6/2.4 GHz MSS proceedings, to do so would be inequitable in these three proceedings.[20]

As a result of that decision, APC, Cox, and Omnipoint (as well as any preference winners in the LMDS and Big LEOs/MSS proceedings) would not be required to pay for their licenses.

6. Subsequent to the decisions awarding final pioneer's preferences to APC, Cox, and Omnipoint and requiring no payment for the pioneer's licenses, a number of applicants whose broadband PCS pioneer's preference requests had been denied petitioned for judicial review raising a number of challenges to the awards.[21] A primary argument of the petitioners to the court was that the Commission had not adequately explained its decision to retain the pioneer's preference program and to award the broadband PCS preference licenses for free. The petitioners asked the court to vacate the *Broadband Report and Order* and the *Pioneer's Preference Review Report and Order*. On July 8, 1994, the Commission's General Counsel, on instruction by the Commission, filed a motion in the District of Columbia Circuit asking the court to remand the broadband PCS cases to the Commission for further consideration.[22] The Commission stated that it intended "to reconsider the substance of the decision not to charge these pioneer's preference winners for licenses in circumstances where other licensees in the same service would pay substantial amounts in order to prevail in competitive bidding procedures," and that it would issue a decision within two weeks of any remand.[23]

7. By order dated July 26, 1994, the court granted the Commission's motion and remanded the cases for further consideration.[24] Due to our commitment to the court to act

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[20] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd 605, 610-11 at para. 9 (footnotes omitted).

[21] *See* Pacific Bell v. FCC, D.C. Circuit Nos. 94-1148. *et al.*

[22] Commission Instructs General Counsel to Seek Remand of Broadband Personal Communications Service Pioneer's Preference Cases, FCC 94-182, Public Notice (released Jul. 8, 1994) ("*July 8 Public Notice*").

[23] Id.

[24] On July 26, 1994, APC filed "Supplemental Comments on Remand" ("*APC Remand Comments*"). A "Joint Response of Pacific Bell and Bell Atlantic Personal Communications to American Personal Communications' Post-Remand Filing" ("*Joint Response*") was filed on August 1, 1994. The *Joint Response* addressed the *APC Remand Comments* and two other filings made by APC: "Emergency Request for Oral Argument" (filed July 21, 1994) ("*APC Emergency Request*") and "Further Comments on Spectrum Blocks for Competitive Bidding and Scope of Preference Awards" (filed June 22, 1994) ("*APC Further Comments*"). *Joint*

expeditiously on such further consideration, we are not addressing here petitions for reconsideration of the *Broadband Report and Order* or the *Pioneer's Preference Review Report and Order*.[25]

III. DISCUSSION

A. Payment Requirement

8. Arguments that APC, Cox, and Omnipoint (as well as any preference recipients in LMDS and Big LEOs) should pay for their licenses were considered in the *Pioneer's Preference Review Report and Order*.[26] In that order we decided, as a matter of equity, not to charge APC, Cox, and Omnipoint for the licenses that they may receive pursuant to their pioneer's preference awards.[27] The Commission noted that APC, Cox, and Omnipoint had publicly disclosed substantial details of their system designs in reliance on the continued applicability of the rules and had expended resources to argue the "merits or demerits of the requests and our tentative conclusions addressing the requests."[28] In this order, we revisit the question of payment for the licenses.

Response at 1.

[25] We deny the Emergency Request for Oral Argument filed by APC. We note that oral argument would not be useful in this instance since the parties have had ample opportunity to brief the issues considered here, and APC itself filed supplemental comments on remand after filing its emergency request. We would not be able to schedule or and hold oral argument in any event within the deadline for action specified in our request for remand.

[26] While our discussion here focuses on broadband PCS because that is the proceeding on which the parties focused and the only one of the three at issue that has progressed to final award of pioneer's preferences, our discussion applies to the LMDS and Big LEO proceedings as well, unless otherwise indicated.

[27] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9. We previously had decided that we would not require the narrowband PCS pioneer's preference grantee, Mtel, to pay for a license awarded on the basis of its pioneer's preference grant. *See* Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Notice of Proposed Rule Making, 8 FCC Rcd 7692, 7694-95, para. 18; *Narrowband Reconsideration*, 9 FCC Rcd at 1316, para. 45. Subsequently, on consideration of Mtel's application for a license, the Commission determined that "[it] cannot reach the conclusion that a grant to Mtel would serve the public interest, convenience, and necessity without requiring that Mtel pay for its license." *See* Nationwide Wireless Network Corp., FCC 94-187, Memorandum Opinion and Order at para. 19 (released July 13, 1994) (*Mtel Order*). Accordingly, the Commission conditioned Mtel's grant on a payment requirement.

[28] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9.

9. At the outset, we note that, since the adoption of the *Pioneer's Preference Review Report and Order* and the *Broadband Report and Order* in December 1993, we have adopted four reports and orders in the Competitive Bidding proceeding setting forth general auction rules and specific auction rules for narrowband PCS, interactive video and data services (IVDS), and broadband PCS.[29] This has led to a greater understanding on our part of how the competitive bidding process will work in the context of the award of spectrum for various services and, in particular, broadband PCS. It has also resulted in concern over the award of free licenses to some parties when other licensees competing in the same markets must bid and pay substantial amounts of money for their licenses. In particular, we are concerned that the award of free licenses to APC, Cox, and Omnipoint would result in unjust enrichment of the parties and give them a financial advantage over licensees who may pay significant sums for their licenses. We also are concerned about the effect that granting free licenses to these applicants might have on the auction process.

10. In adopting the pioneer's preference procedures, the Commission sought to foster the development of new services and to improve existing services by reducing the delays and risks for innovators associated with the Commission's allocation and licensing processes as they existed then.[30] In particular, the Commission was concerned that an innovator facing a lottery had no assurance of receiving a license and therefore no confidence in its ability to obtain a license as a reward for its efforts.[31] We decided to offer a significant reward to encourage innovators to present proposals for new technologies and services to the Commission in a timely manner. In crafting this "reward," our intention was to assure innovators that they would be able to obtain licenses so as to implement their innovations. We did not contemplate rewarding an innovator by giving it a license for free while its competitors had to pay, because at that time no one paid for initial licenses. Rather, we decided to permit an otherwise qualified pioneer's preference recipient to apply for a license without facing competing applications:[32]

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[29] Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*") (*general auction rules*); Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Third Report and Order, 9 FCC Rcd 2941 (1994) (*narrowband PCS auction rules*); Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (*IVDS auctions rules*); and Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178 (released July 15, 1994) ("*Competitive Bidding Fifth Report and Order*") (*broadband PCS auction rules*).

[30] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3488, para. 1.

[31] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, paras. 1 and 5.

[32] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3490, para. 19.

> Our objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore to encourage the development of new services and new technologies. The essence of this risk and uncertainty is that they may not be awarded a license and, therefore, may not be able to take their developmental work into full business operation. **The most workable action we can take to reduce this risk is effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service by precluding competing applications.**[33]

11. The Commission concluded that it has the authority to grant a dispositive preference as a reward for innovation.[34] The text of the Commission's decisions make clear that the overriding objective of the pioneer's preference rules was to ensure the award of a license to an otherwise-qualified pioneer's preference recipient. Nowhere did the Commission suggest that it wished to give the preference recipient a financial or competitive advantage over other licensees.[35] Indeed, in rejecting proposals to give preference recipients a formal headstart over other licensees, the Commission explicitly rejected that goal.[36] We

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[33] 6 FCC Rcd at 3492, para. 32 (emphasis supplied).

[34] 6 FCC Rcd at 3492, para. 33. Upon reconsideration, the Commission affirmed that the preference will be dispositive. 7 FCC Rcd 1808, 1809 at para. 8. On further reconsideration, the Commission discussed at length its legal authority to award a dispositive preference. *See* 8 FCC Rcd 1659 (1993).

[35] *See* discussion at para. 19, *infra*.

[36] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34:

> We further have decided not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license. The commenting parties have convinced us that no additional headstart is necessary. As Southwestern Bell points out, the main effect of a headstart would be to give the pioneer a temporary service monopoly. As Southwestern Bell, Geller and Lampert, and others note, the key public interest benefit of a preference is the assurance to the pioneering entity that, if otherwise qualified, it will receive a license. For the Commission to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time.

[footnote omitted.]

have recognized from the outset that pioneer's preference recipients may receive a *de facto* headstart because of the nature of our licensing process, but we specifically declined to provide a headstart beyond any such *de facto* headstart.[37] In light of this background, the arguments of the petitioners to the court, and our further understanding of the auction process, we now conclude that our pioneer's preference rules should be amended to require preference recipients in those proceedings where tentative decision had been reached at the time of the auction statute's enactment to pay for licenses.

12. We do not decide in this order whether the pioneer's preference policy remains useful, and choose not to do so in this order, which involves pioneer's preference awards in proceedings where tentative decisions were made prior to the legislation granting authority to conduct auctions. We do reconsider how the pioneer's preference policy should be implemented in the auction environment with respect to proceedings where tentative preference decisions were made before Section 309(j) was enacted. This decision thus addresses only the transitional question of appropriate changes in our pioneer's preference rules for those three proceedings where tentative decisions already had been adopted when auctions were authorized.

13. At the time the pioneer's preference rules were adopted, all licenses were awarded at the same price -- for free. We see no sound public interest reason to award some licenses for free when other licensees who will compete in the same markets will have to pay for them. Pioneers were never promised a free license, or even a discount or a bonus, but instead were assured that they would be able to obtain a license if they developed valuable technological innovations. Moreover, we fail to advance Congress's objective, set out in Section 309(j)(3)(C) of the Act, of "avoidance of unjust enrichment" if we award pioneer's preference licenses to these applicants for free.[38] We recognize that Congress has instructed us not to seek to maximize auction revenues at the cost of other important objectives. Nonetheless, we do not interpret that admonition to require us to award pioneer's preference licenses for free if that would serve no valid public interest purpose and in fact would disserve other important objectives. Accordingly, we conclude that the proper application of the pioneer's preference policy in the auction environment where tentative decisions were made prior to the auction statute is to guarantee that the pioneers receive licenses, but on roughly the same terms as other licensees. That is no less than the pioneers were promised when the pioneer's preference policy was adopted.

14. Our decision here is buttressed by our concerns about introducing financial inequalities into the broadband PCS market. We recognize, as APC's economic experts

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[37] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34.

[38] *See Joint Response* at 12-15. We recognize this purpose relates specifically only to auction winners. Nevertheless, given the close relationship of our decision here to the auction process, we believe it is appropriate to take this purpose into account here.

argue, that profit-maximizing firms in a competitive market will not base their pricing and output decisions on "sunk costs," but on marginal or incremental costs.[39] We nevertheless believe it self-evident that awarding licenses for free to some parties while requiring others to pay substantial sums is likely to provide the pioneers with a financial advantage over their competitors. We do not seek to equalize the financial status of competitors or to handicap those that obtain advantages by virtue of their other activities or holdings. Here we see no legitimate basis for creating financial advantages for some parties over their competitors. We would not charge pioneer's preference winners for their licenses simply to enhance the government's revenues or to ensure that pioneer's preference recipients do not have lower debt payments than their competitors, if there were a good public interest reason to award licenses to pioneers without requiring payment. But based on the record here, and in light of our experience with auctions, we conclude that our public interest mandate requires that pioneers not obtain licenses free of charge while their competitors must purchase licenses at auction. Providing licenses to preference winners for free would give a financial advantage to some competitors with no public interest benefit. We believe such action would disserve important public policy objectives.

15. As the Joint Response points out, moreover, the auction process itself was designed in large part to promote competition by assigning spectrum to users that are most likely to offer new, better, and lower cost services.[40] Congress enacted our statutory auction authority in large measure based upon the theory that awarding licenses to those who value them most will encourage growth and competition in the development of new services. Granting some licenses free necessarily would undermine this purpose to the extent that the recipients of free licenses might not have valued them as much as the other bidders. Our decision to require a payment tied to the actual auction results permits the competitive bidding process to identify -- as it was intended to do -- those applicants who value the licenses most and thus can be expected to compete vigorously in the development of new services. If the pioneers are unwilling to pay even the discounted charges we order, the licenses will be awarded to those who value them most highly.

16. On further reflection, we are convinced that the equities, considered more broadly, favor a policy requiring payment. In making equitable determinations, we must balance the interests of all affected parties and of the public.[41] The public would not be favored by free grants, which might frustrate, at least in part, the Commission's efforts to

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[39] *See APC Remand Comments*, at 1-6 and Joint Affidavit of John P. Gould and Gustavo E. Bamberger.

[40] *See Joint Response* at 6.

[41] *E.g.*, McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (Commission must balance "all relevant interests").

recover for the public a part of the value of the spectrum the pioneers will use.[42] Our decision here avoids the "unjust enrichment" that free licenses would provide in the new auction environment that did not exist when these parties applied for preferences.[43] Charging them for their licenses thus is "equitable" to the pioneers as well. We conclude on further review of this issue that requiring payment is an equitable decision as well as a sound legal and policy decision.

17. We recognize that preference recipients have argued that the public interest would be served by granting them free licenses as a reward for investments and disclosure of information they have made in reliance on their expectation of a preference.[44] There is, however, no evidence in the record to suggest that such investment and information disclosure would not have been made if the preference recipients had known they would have to pay for a guaranteed license. We believe it is reasonable to conclude that, to the extent this investment and disclosure related to Commission rules at all, it related to the expectation of a guaranteed license, not a guaranteed license without payment where other competitors must pay for their licenses.

18. Our decision to require payment also is driven by concern for a rational and fair auction process. The Commission has issued a number of orders relating to auctions since we decided initially that the pioneers in these three proceedings would not have to pay for their licenses, and our understanding of the auction process has grown as we have resolved various issues relating to the auctions. For example, in the *Competitive Bidding Second Report and Order,* we concluded that, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve our goals for competitive bidding and would award interdependent licenses to the bidders who value them the most.[45] In addition, we concluded that highly interdependent licenses should be grouped together and put up for bid at the same time in multiple round auctions.[46] We later expressed our belief that the values of most broadband PCS licenses will be significantly interdependent.[47] In addition, while we believe that all broadband PCS

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[42] *See* 47 U.S.C. § 309(j)(3)(C).

[43] Id.

[44] *See* Comments of American Personal Communications (filed Nov. 15, 1993) at pp. 8-11, 15-16.

[45] 9 FCC Rcd at 2367, paras. 109-111.

[46] 9 FCC Rcd at 2366, paras. 106-107.

[47] *Competitive Bidding Fifth Report and Order* at para. 31:

> We further believe that the values of most broadband PCS

licenses are interdependent, we decided not to auction them all simultaneously due to the cost and complexity of auctioning a very large number of interdependent licenses simultaneously.[48] Instead, we decided to "divide the licenses into three groups by combining those licenses that are most closely related so that there will be limited interdependence across groups."[49] We determined to auction the 99 available 30 MHz MTA licenses in Blocks A and B in the first auction.[50] We now have a clearer understanding of the interdependence of the broadband PCS MTA licenses and the significant impact that the free award of some of those licenses might have on the rationality and fairness of the auction process. In light of this interdependence, the degree to which a free license could result in uneconomic allocation of the spectrum is increased. Indeed, the entire bidding process might be distorted by awarding a pioneer's preference recipient a license without payment requirements.[51]

19. In sum, based on our re-evaluation of the record, and our own understanding of the relevant issues, we conclude that pioneer's preference recipients in proceedings where tentative decisions had been reached at the time of the auction statute's enactment should be required to pay for their licenses.[52] The amount of payment will be determined in the context of each proceeding. We amend our pioneer's preference rules accordingly.[53]

> licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions and because there is a high degree of substitutability among licenses with the same amount of spectrum and covering the same geographic region.

[48] *Competitive Bidding Fifth Report and Order* at para. 36.

[49] Id.

[50] Id. at para. 37. The 986 Basic Trading Area (BTA) licenses in Blocks C (30 MHz) and F (10 MHz) will be put up for bid in the second broadband PCS auction. The 986 10 MHz BTA licenses in Blocks D and E will be put up for bid in the last auction. Id.

[51] *See* discussion at para. 15, *supra*.

[52] The Commission has undertaken a negotiated rulemaking procedure in an attempt to adopt rules for Big LEOs that will avoid mutual exclusivity. Our decision regarding payment for any Big LEO preference awards would only be relevant if mutually exclusive applications can not be avoided and an auction becomes necessary.

[53] We note that Congressman Dingell recently introduced legislation that would amend Section 309(j)(6)(G) of the Communications Act, 47 U.S.C. § 309(j)(6)(G), to require that the Commission charge a pioneer's preference recipient 90% of the highest bid for a comparable license. *See* H.R. 4700, 103d Cong., 2d Sess. (1994) ("Pioneer Preference

B. Amount of Payment in Broadband PCS

20. In our recent narrowband PCS decision awarding a license to a pioneer, we required the recipient, Mtel, to pay either ninety percent (90%) of the lowest winning bid for a comparable license or $3 million less than the lowest winning bid, whichever is less. We decided not to require Mtel to pay the full value of the license, as determined at the auction, because we had imposed more stringent build-out requirements on Mtel than on other narrowband PCS licensees and because we had disrupted Mtel's business plans by deciding to charge for the license after earlier deciding that Mtel would not have to pay. The first of those circumstances is not applicable here because we have imposed no additional build-out requirement on pioneers receiving broadband PCS licenses. On the other hand, we did conclude previously that APC, Cox, and Omnipoint would receive their licenses without charge. And we have decided to condition the broadband PCS grants on the licensees holding their licenses for a minimum of three years or until the five-year construction requirements have been satisfied.

21. In spite of the differences, we have decided to adhere to a similar formula in this case that we applied to Mtel, which also involved a party that had been tentatively awarded pioneer's preference before we were granted authority to auction licenses. We believe the formula set forth below should adequately compensate APC, Cox, and Omnipoint for any transaction costs incurred in reliance on our prior determination that they would receive their licenses for free, particularly since that determination remained subject to challenge in court. At the same time, we are not concerned that a discount of that amount will provide these pioneers with an excessive financial advantage over their competitors, since the discount will amount to a small fraction of the cost of the license, which in turn is only one part of the cost of building a system. Nor do we believe that this discount will affect the auction process adversely.[54]

22. The *Joint Response* argues that the Commission can choose one of two ways to implement the payment requirement: (i) require the pioneer's preference recipients to participate in the auction, but give them a discount; or (ii) withhold the licenses from the auction but condition their award on payment of a sum discounted from auction prices as was done with Mtel.[55] The parties filing the *Joint Response* favor the former method. For this

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Reform Act of 1994"). We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience.

[54] We note that the narrowband PCS auctions, which took place after we decided to require Mtel to pay a discounted amount for its license, produced total winning bids of $617,006,674. *See* Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Public Notice, Mimeo No. 44177 (Aug. 2, 1993). This amount was significantly more than expected by some observers of the licensing process.

[55] *Joint Response* at 15-16.

transition period, we will withhold the licenses from the auction, but require a discounted payment. This result is closer to the original intent of the pioneer's preference programs's guarantee of a license. A bidding credit, in contrast, would put the pioneer at risk that it might not receive a license. We reserve the right, for pioneer's preference awards made entirely in the post-auction environment, to revisit this issue in the ongoing Pioneer's Preference Review proceeding.

23. We note that a variety of mechanisms for determining the pioneer's payment have been proposed to the Commission. APC argues that, if there is to be a payment, a 25% discount below the national average price of licenses for broadband PCS MTA licenses is appropriate because the auction price of the second license in the pioneer's MTA is likely to be higher in a market where it is the only 30 MHz license available.[56] Basing payment on a "national average" would result in significantly undervaluing the licenses at issue here. As the *Joint Response* points out, the three broadband PCS licenses involved here are all for major markets. We note that the preference holders in broadband PCS would receive licenses for three of the most populous MTAs. The New York MTA is ranked No. 1; the Los Angeles-San Diego MTA is ranked No. 2; and the Washington-Baltimore MTA is ranked No. 10 in the Rand McNally 1992 Commercial Atlas & Marketing Guide. The auction prices paid for licenses in much smaller markets should not be averaged in with the prices paid in those large markets to determine what the pioneers should pay. At the same time, we recognize that using the other comparable MTA licenses (i.e., the other 30 MHz license in each region) in the market may not be the most appropriate measure. Unlike the situation with narrowband PCS, where several other comparable licenses in the nationwide market existed as a basis for calculating the payment amount for the preference winner, the use of what is now only one other comparable license in the market might lead to a somewhat distorted result. To address this problem, broadband PCS pioneer's preference winners will have a choice of payment methods. They may pay either ninety percent (90%) of the winning bid for the other 30 MHz license in the MTA or ninety percent (90%) of the adjusted value of the license which is calculated based on the average per population price for the 30 MHz licenses in the top 10 MTAs as established at the auction.[57] This latter amount would be calculated by adding together the winning bids for the other 30 MHz MTA licenses for the top 10 markets offered at auction[58] and dividing by the total population

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[56] *See APC Emergency Request* at 11-12, *APC Further Comments* at 3.

[57] Should the spectrum or market size of the pioneer's preference recipients' tentative awards be changed due to the pending reconsideration of these awards, the payment would be based on the then comparable license.

[58] A total of twenty 30 MHz MTA licenses in the top 10 markets are available in Blocks A and B for broadband PCS - two per each market. *See* 47 C.F.R. § 24.202 (Service Areas) and 47 C.F.R. § 24.229 (Frequencies).

covered by those licenses.[59] This would establish an average per population (per pop) price for the top 10 MTAs. The preference recipient would then multiply the average per pop price by the population of its MTA to establish the pre-discount value of its license. The preference recipient would be required to pay ninety percent (90%) of that amount. Taking into account all of the top 10 markets in the latter payment method will help avoid any such distortion without the problem of including substantially smaller markets which would itself distort the result. We will not include the $3 million dollar option that we had in the narrowband context. We believe that the options here will cover the costs discussed in para. 21, *supra*.

24. One party has proposed, as an option to a price based on auction results, that pioneers pay a royalty of 3%-5% on gross revenues over 10 years as the appropriate payment mechanism.[60] First, we find that this payment method is too speculative because the amount of the payment can not be determined until years after the fact. Second, this method may result in a payment amount that is not commensurate with the present market value of the license itself because it is based on a different measure. It also fundamentally departs from the auction concept because it is based upon after-the-fact results rather than forecasts of revenues which other potential licensees must develop and rely on in determining the amount they are willing to bid for their license. We conclude that the payment options imposed here strike the correct balance between the avoidance of unjust enrichment on the part of some broadband PCS licensees and the transition to auctions to award broadband PCS licenses.

25. Any broadband PCS licenses awarded to pioneer's preference recipients will be conditioned upon their making the required payments. Their payments must be received no later than thirty (30) days after the orders granting their licenses and their pioneer's preferences have become final, as well as the decision here to require payment, that is, 30 days after the orders are no longer subject to administrative reconsideration or judicial review.

C. Authority to Require Payment

26. Our decision requires us to determine whether we have authority to amend our pioneer's preference rules to require pioneer's preference recipients to pay for their licenses.

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[59] Population should be calculated based on the 1990 U.S. census figures as published in the Rand McNally 1992 Commercial Atlas & Marketing Guide. Total population means the population covered by each of the other MTA licenses, *e.g.*, the population of the Chicago MTA (Market No. 3) would be included twice because two licenses for that MTA will be auctioned.

[60] *See* Ex Parte Letter from Douglas G. Smith, President, Omnipoint Corporation to William F. Caton, Acting Secretary, FCC (July 5, 1994).

The question of our authority to require payment from pioneers was raised in the rulemaking notice that began our Review of Pioneer's Preference Rules;[61] but we did not resolve the question in that proceeding because we decided at that time not to require payment by narrowband or broadband PCS preference recipients.[62] Now that we have decided to require payment by the preference winners in these proceeding, we must consider our authority to do so. Our analysis in this case is similar to that in our order granting Mtel's narrowband PCS license subject to a payment condition.[63]

27. Section 309(j) of the Communications Act,[64] the source of our authority to select licensees by auction, applies only when the Commission has accepted "mutually exclusive applications" for licenses or construction permits. APC, Cox, and Omnipoint, by operation of our pioneer's preference rules, are the only entities eligible to apply for the licenses at issue, and there can be no mutually exclusive applications for those licenses.[65] Thus, we could not require APC, Cox, and Omnipoint to bid in an auction under Section 309(j) unless we amended our pioneer's preference rules to change the nature of the pioneer's preference award,[66] which we do not do here.

28. Some parties at various stages of these proceedings have contended that Section 309(j) is the only source of authority for the Commission to assess a charge (other than a generally applicable fee) for a license, and that we have no choice but to grant APC, Cox, and Omnipoint's licenses without requiring payment.[67] We disagree, and for the reasons that follow, we find such authority under Section 4(i),[68] in conjunction with Sections 1, 303(r),

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[61] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, 7693, para. 10.

[62] Id. at 7694-5, para. 18. *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9. We did, however, conclude that any such rule change would not constitute retroactive rulemaking. Id., 9 FCC Rcd at 610-11, n.24.

[63] *See Mtel Order*, supra, note 27.

[64] 47 U.S.C. § 309(j).

[65] We reiterate that while we name the three current recipients of broadband PCS preferences for ease of reference, we emphasize that by doing so we do not prejudge the petitions for reconsideration of our broadband PCS pioneer's preference decision. The payment rule we adopt here will apply to all proceedings in which we made a tentative (but not final) decision regarding preferences as of August 10, 1993 in the three proceedings.

[66] *See Pioneer's Preference Review NPRM.*

[67] *See, e.g., Narrowband Reconsideration*, 9 FCC Rcd 1315-16, para. 44.

[68] 47 U.S.C. § 154(i).

307, 309, and 214,[69] of the Communications Act.

29. Section 4(i), which has been called the "necessary and proper clause" of the Communications Act,[70] authorizes the Commission to

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

We could not rely upon Section 4(i) to contravene an express prohibition or requirement of the Act, as the language of Section 4(i) itself makes clear. Thus, if any provision of the Act prohibited the Commission from imposing a charge on a pioneer's preference recipient, Section 4(i) would not be an independent basis for such authority. But no provision of the Act addresses this issue, either expressly or implicitly. Therefore, requiring preference recipients to pay for their licenses is "not inconsistent with the Act."[71]

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[69] 47 U.S.C. §§ 151, 303(r), 307, 309, 214(c).

[70] *See* New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989) (quoting North American Telecomm. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985)). The reference is to Article I, Section 8, Clause 18 of the Constitution, which authorizes Congress to make all laws that shall be "necessary and proper" for carrying out the enumerated powers "and all other powers" vested in the federal government.

[71] *See* North American Telecomm. Ass'n v. FCC, 772 F.2d at 1292-93.

Assessing an auction-based charge is not contrary to the Supreme Court's decision in National Cable Television Ass'n v. FCC, 415 U.S. 336 (1974) (NCTA). In that case, as subsequently described, the Supreme Court struck down Commission fees that the Court perceived as an effort "to recover from regulated parties costs for benefits inuring to the public generally." Skinner v. Mid-American Pipeline Co., 490 U.S. 212, 223-24 (1989) (Skinner). The Court in NCTA said that the only proper measure of the fee was "value to the recipient." 415 U.S. at 342-43, 344. In this instance, we do not seek to recover from APC, Cox, and Omnipoint (and, by extension, from other licensees who pay auction-based charges) "costs for benefits inuring to the public generally." Skinner, 490 U.S. at 224. Indeed, the "measure" of the charge for APC, Cox, and Omnipoint is precisely the one identified in NCTA as the only proper measure -- the value of the license to the recipient. That value is determined by the auction price -- the value that bidders are willing to pay -- discounted for APC, Cox, and Omnipoint's special circumstances. *See* para. 20, *supra*. This assessment thus does not raise concerns that the Commission may have used an incorrect standard in setting the charge. 415 U.S. at 343. Moreover, because the action the Commission takes here does not put it "in search of revenue in the manner of an Appropriation Committee of the House," NCTA, 415 U.S. at 341, no issue of impermissible

30. The remaining inquiry under Section 4(i) is whether the action the Commission proposes to take "may be necessary in the execution of its functions." In application, Section 4(i) has been held to justify FCC orders that were not within explicit grants of authority, where the orders reasonably could be found to be "necessary and proper" for the execution of the agency's enumerated powers. In Nader v. FCC,[72] for example, the court held that an FCC order prescribing a rate of return for AT&T "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority."[73] This was so even though the Communications Act gave the Commission express authority, in Section 205(a),[74] to prescribe "any charge, classification, regulation, or practice of any carrier...," but did not mention any authority to prescribe a rate of return. Similarly, in Lincoln Telephone & Telegraph Co. v. FCC,[75] the court affirmed an order of the Commission requiring the telephone company, which was a "connecting carrier" within the meaning of the Act, to file tariffs with the FCC offering certain services. The order was upheld even though the only provision in the Act requiring carriers to file tariffs, Section 203(a),[76] specifically exempted connecting carriers from that requirement. The court held:

> Section 203(a)'s terms do not ... in any way suggest that the section provides the exclusive authority under which the Commission can require a tariff to be filed. Thus, while Section 203(a) did not grant the Commission the requisite authority for its action, Section 154(i) did.[77]

31. In North American Telecomm. Ass'n v. FCC,[78] the Seventh Circuit affirmed an order requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Act conferred no authority on the FCC over holding companies and the legislative history of the Act suggested that

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delegation of taxing authority arises. Id. The charge here is determined directly by the auction process, and not by any concern for raising revenues "to recover administrative costs not inuring directly to the benefit of the parties...." Skinner, 490 U.S. at 224.

[72] 520 F.2d 182 (D.C. Cir. 1975).

[73] Id. at 204.

[74] 47 U.S.C. § 205.

[75] 659 F.2d 1092 (D.C. Cir. 1981) (Lincoln Telephone).

[76] 47 U.S.C. § 203(a).

[77] Lincoln Telephone, 659 F.2d at 1108-09.

[78] 772 F.2d 1282 (7th Cir. 1985) (North American).

Congress had considered granting such authority but ultimately had denied it.[79] The court held that the Commission's authority to require the capitalization plans arose under "a separate grant of power" -- Section 4(i).[80] The only real question, the court said, was

> whether the Commission could reasonably conclude that requiring the regional [holding] companies to submit plans of capitalization ... was necessary and proper to the effectuation of [the Commission's order requiring the separation of equipment sales from the companies' telephone operations].[81]

The court answered that question in the affirmative in holding that Section 4(i) authorized this action.

32. In New England Telephone & Telegraph Co. v. FCC,[82] the D.C. Circuit affirmed the Commission's order requiring AT&T (along with its former operating companies) to refund rates it had collected in excess of its authorized rate of return, rejecting the telephone companies' argument that the Commission's only statutory authority to require refunds, under Section 204(a)(1),[83] did not apply to their situation. Agreeing with the telephone companies that Section 204 "does not apply to the circumstances of this case,"[84] the court held that the Commission had "properly exercised its authority under section 4(i) to remedy the violation" of its rate of return order.[85] The court found that the Commission's choice of the refund remedy, "[i]n a strictly technical sense," was "absolutely necessary" to the effectuation of its rate of return prescription.[86] But it made clear that the Commission was not required to show that it had selected "the only conceivable remedy in order to invoke

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[79] Id. at 1291-92.

[80] Id. at 1292.

[81] Id. at 1293. It is noteworthy that the order requiring structural separation of equipment sales from telephone operations is itself an action not expressly authorized by the Act. Structural separations requirements have been affirmed as proper exercises of the Commission's "ancillary jurisdiction." *See* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 211 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[82] 826 F.2d 1101 (D.C. Cir 1987) (New England).

[83] 47 U.S.C. § 204(a)(1).

[84] New England, 826 F.2d at 1107.

[85] Id. at 1109.

[86] Id. at 1107-08.

its 4(i) powers."[87] It was enough that the action chosen by the agency "was appropriate and reasonable."[88]

33. The rule that emerges from the cases described above is that Section 4(i), although "not infinitely elastic,"[89] is a "wide ranging source of authority."[90]

> Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries.[91]

If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions.[92]

34. Applying this rule here, we find authority under Section 4(i) to amend our pioneer's preference rules to condition any licenses granted to APC, Cox, and Omnipoint, on the basis of their pioneer's preferences, on the payment of an appropriate charge. First, requiring payment by APC, Cox, and Omnipoint is "necessary" if we are properly to carry out our public interest mandate in licensing broadband PCS providers.[93] An important aspect of the public interest is promoting competition to the extent feasible and taking appropriate regulatory steps to ensure that the competition is fair.[94] Our development of PCS and of the pioneer's preference policies appropriately has emphasized competition at every step. Granting APC, Cox, and Omnipoint a license free of charge, we have found in this order,

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[87] Id. at 1108.

[88] Id.

[89] North American, 772 F.2d at 1292.

[90] New England, 826 F.2d at 1109.

[91] North American, 772 F.2d at 1292. *See also* U.S. v. Southwestern Cable Co., 392 U.S. 157, 181 (1968); Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1315 (D.C. Cir. 1988); FTC Communications, Inc. v. FCC, 750 F.2d 226, 232 (2d Cir. 1984).

[92] North American, 772 F.2d at 1293.

[93] *See* 47 U.S.C. §§ 307(a), 309(a), 214(a) and (c). *See also* 47 U.S.C. § 151.

[94] *See* National Ass'n of Regulatory Until. Comm'rs v. FCC, 525 F.2d 630, 636 and n. 25 (D.C. Cir), cert. denied, 425 U.S. 992 (1976). See also McLean Trucking Co. v. U.S., 321 U.S. 67, 86-88 (1944).

would likely give APC, Cox, and Omnipoint a financial advantage over other licensees competing in the same markets, who would have to pay auction prices -- a result that would not serve the public interest.

35. Second, requiring payment by APC, Cox, and Omnipoint is "necessary and proper" in the execution of our function under Section 309(j) to implement a rational, fair system of competitive bidding. We have found elsewhere that the values of broadband PCS licenses will be significantly interdependent. The prices a bidder might be willing to pay -- or even the willingness to bid at all -- might be affected in various ways by the fact that some of the licenses are available free to applicants who will be competing with the auction winners. Awards to APC, Cox, and Omnipoint free of charge thus might distort significantly the auction of other broadband PCS licenses and, thereby, defeat or at least undermine some or all of the purposes of having the auction. In this regard, we note that the auction statute itself does not limit our authority to require pioneer's preference recipients to pay for their licenses; it is neutral on this point.[95] And third, as noted above, requiring payment will serve Section 309(j)'s purpose of avoiding unjust enrichment.

36. We recognize that our decision here is a reversal of the course we took initially with respect to payments made by the broadband PCS pioneers. In this regard, it is similar to our recent decision to require payment by Mtel for its narrowband PCS license after first deciding not to require payment. We asked the court for a remand of the pioneer's preference review order and the broadband PCS pioneer's preference order to give further consideration to this important issue.[96] We believe that this change is well supported by the record and best serves the public interest. When we first considered the payment question these pioneers had only their tentative preferences and, even now, their preferences are the subject of petitions for reconsideration and petitions for review. Thus, not only do we believe that our change of course is legal and best serves the public interest, we also believe it does not undermine any legitimate reliance interests of APC, Cox, and Omnipoint.

D. Ex Parte Rules

37. We note that in their briefs to the court, petitioners and amicus curiæ raised allegations of violations of the Commission's ex parte rules. These issues were addressed in a letter by the Managing Director;[97] and our General Counsel reviewed the contacts in depth

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[95] *See* 47 U.S.C. § 309(j)(6)(b); H.R. Rep. No. 111, 103d Cong., 1st Sess. 257 (1993).

[96] The question of payment was still technically before the Commission as a result of a timely filed petition for reconsideration of the *Pioneer's Preference Review Report and Order*. 47 U.S.C. § 405. *See* Wrather-Alvarez Broadcasting v. FCC, 248 F.2d 646 (D.C. Cir. 1957) (where petition for agency reconsideration is filed, agency has jurisdiction even though other parties have sought judicial review).

[97] Letter from Andrew S. Fishel to Michael K. Kellogg, Esquire (May 27, 1994).

in preparing a response to a congressional inquiry.[98] We have thus had an opportunity to consider, with substantial staff analysis, the allegations. While the matter has not been formally brought to the Commission, e.g., through an application for review of the Managing Director's letter, we take this opportunity to affirm the Managing Director's letter.

IV. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 303(r), 307, 309, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 307, 309, and 214, that Section 1.402 of the Commission's rules, 47 C.F.R. § 1.402, IS AMENDED as set forth in Appendix A to be effective thirty (30) days after publication in the Federal Register.

39. Accordingly, IT IS FURTHER ORDERED that the relevant licensing bureau shall impose the following additional condition on any licenses received by pioneer's preference recipients for broadband PCS (GEN Docket No. 90-314) based upon their pioneer's preference awards:

> **Each licensee shall pay to the United States Treasury an amount equal to either ninety percent (90%) of the winning bid for the 30 MHz broadband MTA license in the same market or ninety percent (90%) of the adjusted value of the license calculated based on the average per population price for the 30 MHz licenses in the top 10 MTAs as established at auction, thirty (30) days after an order granting any such license based upon a pioneer's preference, the order granting the preferences, and this order become final orders, that is, thirty (30) days after the order is no longer subject to administrative reconsideration or judicial review, appeal, or stay.**

40. IT IS FURTHER ORDERED that the Emergency Request for Oral Argument filed by American Personal Communications on July 21, 1994 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

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[98] Letter from William E. Kennard to Hon. John D. Dingell (June 3, 1994).

APPENDIX A

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

   Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.402 is amended by adding new subsection (g) to read as follows:

   > (g) Any person receiving pioneer's preferences in proceedings where tentative (but not final) decisions had been reached as of August 10, 1993, will be required to pay for their licenses. The amount of payment shall be determined in each proceeding on a case-by-case basis.

APPENDIX B

Final Regulatory Flexibility Statement

1. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in ET Docket No. 93-266. Written comments with a separate and distinct heading designating them as a response to the IRFA were requested. The Commission's final analysis is as follows:

2. **Need for and purpose of this action.** This proceeding was initiated to obtain comment regarding possible modifications to, or repeal of, the pioneer's preference rules. The rule adopted here will serve the public interest by modifying the pioneer's preference rules in light of the statutory authority to assign licenses by competitive bidding.

3. **Issues Raised in Response to the IRFA.** The IRFA noted that the proposed changes could affect small businesses if they have pioneer's requests pending, it they contemplate filing pioneer's preference requests, or if they intend to file applications for services in which others might receive a pioneer's preference. No commenters responded specifically to the issues raised in IRFA. We note that, with regard to PCS, small businesses receive certain competitive bidding preferences as set forth in the Third Report and Order, 9 FCC Rcd 2941 (1994) and the Fifth Report and Order, FCC 94-178 (released Jul. 15, 1994) in PP Docket No. 93-253.

4. **Significant alternatives considered.** All significant alternatives have been addressed in the Memorandum Opinion and Order on Remand.